MOHAMAD NAZRI ALI

v.

ABDULLAH SIDEK

HIGH COURT MALAYA, TEMERLOH
HISHAMUDIN YUNUS J
[CIVIL APPEAL NO: 11-80-99]
11 APRIL 2000
[2000] CLJ JT(3)

CIVIL PROCEDURE: *Judgments and orders - Subordinate Court - Setting aside - Default judgment entered under O. 14 r. 5(3) Subordinate Courts Rules 1980 - Whether could be set aside by magistrate - Whether magistrate had power to set aside his own judgment - Application to set aside before magistrate - Whether misconceived - Proper procedure - Whether to appeal to High Court - Subordinate Courts Rules 1980 O. 1 r. 4, O. 14 r. 5(3), O. 19 rr. 2, 9, O. 29 r. 14, O. 53 r. 11 - Subordinate Courts Act 1948, s. 99A, s. 19 of Third Schedule*

JURISDICTION: *Magistrate's court - Setting aside judgment - Whether magistrate could set aside his own judgment and order - Inherent powers of Subordinate Courts - Extent and scope - Subordinate Courts Rules 1980, O. 14 r. 5(3), O. 53 r. 11*

The learned magistrate in this case had granted a judgment in default of defence against the defendant ('the order') under O. 14 r. 5(3) of the Subordinate Courts Rules 1980 ('the SCR'). The defendant applied to the Magistrate's Court to set aside the order, but the application was dismissed by the learned magistrate on the grounds that he had no power to set aside the order, that the application to set aside was misconceived, and that the correct procedure was for the defendant to appeal to the High Court. The defendant appealed to the High Court against the magistrate's ruling, arguing that the application to set aside was wrongly dismissed. According to the defendant: (i) he could apply to set aside the order by reason of O. 1 r. 4 of the SCR, as that rule permits the adoption by the subordinate court of the procedure of the High Court, in particular O. 19 rr. 2 and 9 of the Rules of the High Court 1980 ('the RHC'); (ii) a subordinate court could always "discharge" its own judgment or order under s. 19 of the Third Schedule, Subordinate Courts Act 1948; and (iii) the learned magistrate had the power to set aside the order by virtue of the court's inherent power under O. 53 r. 11 SCR.

Held:

[1] The learned magistrate has made a correct decision. By O. 29 r. 14 of the SCR, a party may apply to set aside (or vary) a judgment or order **only** in situations where provisions are made for the setting aside (or varying). Order 14 SCR, however, contains no provision as to the setting aside (or varying) of an order made under para. (3). It follows therefore that, in respect of a judgment or an order made by a subordinate court under O. 14 r. 5 (3) SCR, there is no recourse to setting aside (or varying) the same. In such a situation, the appropriate procedure is for the aggrieved party to appeal to the High Court against the decision.

[2] The contention that the learned magistrate should invoke O. 1 r. 4 of the SCR and hence apply O. 19 rr. 2 and 9 of the RHC is untenable. Merely because the SCR does not contain any provision for the setting aside by the Magistrate's Court of its judgment given in default of defence does not mean that there is a lacuna in the SCR. There is indeed no lacuna at all in the SCR, for, in respect of a decision made under O. 14 r. 5(3), there is still avenue to have the decision set aside. The aggrieved party can invoke O. 49 r. 6 of the SCR and appeal to the High Court. In any case, assuming that there was a practice by subordinate courts to apply O. 1 r. 4 of the SCR to set aside its judgments or orders, such practice clearly contravenes O. 29 r. 14 of the SCR and is wrong in law.

[3] The power of the subordinate court to 'discharge' its judgments or orders under s. 19 of the Third Schedule of the Subordinate Courts Act 1948 is restrictive in nature, as the power may be exercised only "to the extent and in the manner provided by rules of court". The SCR are such rules. Therefore, as the SCR have prescribed the situations or circumstances in which the power to set aside may be exercised (*eg*, O. 2 r. 2, O. 24 r. 8, O. 25 r. 7, O. 28 r. 8 and O. 54 r. 10), and in the light of the implication of O. 29 r. 14, it follows that the power to set aside may only be exercised by the court in the situations or circumstances so specified and not otherwise.

[4] The court must thread with caution before invoking its inherent powers under O. 53 r. 11 SCR. The exercise of such powers, in any case, is limited only to situations where it is "necessary to prevent injustice or to prevent an abuse of the process of the court". This being the case, O. 53 r. 11 is clearly irrelevant. It must be so as, before the learned magistrate herein: (i) the defendant did not allege any abuse

of the process of the court; (ii) there was no question of preventing any injustice because the defendant had a right to appeal to the High Court against the decision of the magistrate.

[Appeal dismissed.]

Case(s) referred to:
Hamzah Atan v. Perbadanan Johor [1995] 5 CLJ 183 ***(dist)***
Kewangan Bersatu Bhd v. Yap Ah Yit & Ors [1999] 1 CLJ 429 ***(dist)***
Retnam Pillai v. Bahagia Trading Agency [1977] 1 MLJ 127 ***(dist)***
Shaharuddin Abdul Rahman v. Satisah Ismail Sdn Bhd [1982] 2 MLJ 79 ***(dist)***
Tan Lee Siang & Ors v. Kenneison Brothers Sdn Bhd [1999] 3 CLJ 422 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 19 rr. 2, 9
Subordinate Courts Act 1948, ss. 19, 99A, Third Schedule
Subordinate Courts Rules 1980, O. 1 r. 4, O. 2 r. 2, O. 14 r. 5(3), O. 24 r. 8, O. 25 r. 7, O. 28 r. 8, O. 29 r. 14, O. 49 r. 6, O. 54 r. 10

Other source(s) referred to:
Janab's Key to Civil Procedure in Malaysia and Singapore, 1995, 2nd edn, p 677
Jowitt's Dictionary of English Law, p 620

For the appellant - AM Sebastian; M/s Anthony M Sebastian & Co
For the respondent - Francis Tan; M/s Rosni, Francis Tan & Ho & Co

Reported by WA Sharif

JUDGMENT

Hishamudin Yunus J:

This is an interlocutory appeal to the judge-in-chambers against the decision of the learned magistrate, Temerloh, given on 30 July 1999. In his decision, the learned magistrate dismissed an application by the appellant/defendant to set aside the Magistrate's Court's order of 23 April 1999.

The facts are as follows. On 21 December 1998, the respondent/plaintiff filed at the Magistrate's Court, Temerloh, a summons against the defendant alleging the non-repayment of a loan and claiming a sum of RM10,000. The summons was duly served on the defendant on 10 February. The defendant appeared in court on the return day of the summons ie, 12 February 1999 but was informed by the court that the case had been postponed to 9 April 1999. On 9 April 1999, when the case was called, the defendant disputed the claim. He was ordered to file and serve his statement of defence before the next mention date. He was informed that the next mention date for the case was 23 April 1999. He was advised by the court to engage a counsel. On 13 April 1999 the defendant engaged a

firm of solicitor, Tetuan Bong & Co., to represent him in the suit. On 15 April 1999 the defendant filed in his notice of appearance notifying that he is disputing the plaintiff's claim. However, even until 23 April no statement of defence was filed or served. On 23 April, the counsel for the respondent/plaintiff orally applied for judgment in default of defence. The learned counsel for the appellant/defendant appealed to the learned magistrate for more time. The learned magistrate refused to grant more time and, instead, gave judgment as prayed for by the appellant/plaintiff. On 17 May 1999, the appellant/defendant (who by this time had changed his solicitor to Tetuan Anthony M. Sebastian & Co.) filed an application to set aside the order of 23 April. At the commencement of the hearing of the application on 30 July 1999, the learned counsel for the respondent/ plaintiff made a preliminary objection. The objection taken was that the application to set aside was misconceived in that the correct procedure to be taken by the appellant/defendant was to have been by way of an appeal to the High Court and not by way of an application to set aside. The learned magistrate upheld the preliminary objection, holding that he had no power to set aside his previous order; and he dismissed the application with costs.

The present appeal by the appellant/defendant is only on a point of law. The question of law for my determination is: Was the learned magistrate right in law in holding that he had no power to set aside the magistrate's order of 23 April?

The learned counsel for the appellant/defendant, Encik A. M. Sebastian, submitted that the learned magistrate was wrong in law in upholding the preliminary objection. He was of the opinion that the learned magistrate had the power to set aside his previous judgment given in default of defence. He cited various authorities which I shall discuss in due course in this judgment.

The learned counsel for the respondent/plaintiff, Encik Francis Tan, on the other hand, contended that the learned magistrate was right in law, citing *Retnam Pillai v. Bahagia Trading Agency* [1977] 1 MLJ 127.

In my judgment, the learned magistrate made the correct decision. I am of the view that the appellant/defendant was wrong in law in applying to the Magistrate's Court to set aside the order of 23 April. He should have appealed against the said order. To my mind, in the circumstances of the present case, the law does not provide for setting aside. I base my decision on O. 29 r. 14 of the Subordinate Courts Rules 1980 (hereinafter shall be referred to as the "SCR"). This provision reads:

Setting aside or varying judgments and orders.

14. **Where in these rules provisions are made** for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment. (emphasis added)

I think the opening words "Where in these rules provisions are made" are significant and it is my interpretation that the provision apart from stipulating a 30-day time limit also implies that a party may apply to set aside (or vary) a judgment or order only in situations where provisions are made for the setting aside (or varying). In other words, if, in respect of a judgment or order made by a subordinate court in respect of a civil matter, there is no provision in the Subordinate Courts Rules for the setting aside (or the varying) of that order or judgment, as in the present case, then there is no recourse to setting aside (or varying) the same: the appropriate procedure to be followed by an aggrieved party in such a situation is to appeal to the High Court against that decision.

Instances where an application to set aside may be made are provided by O. 2 r. 2, O. 24 r. 8, O. 25 r. 7, O. 28 r. 8, and O. 54 r. 10.

However, the order of the learned magistrate was made under O. 14 r. 5(3) which provides:

(3) If a defendant fails to comply with the order of the Court made under paragraph (2), the Court may make such order as it thinks just including, in particular, an order that judgment be entered for the plaintiff

Paragraph (2) of r. 5 stipulates:

(2) Where a defendant appears in Court and disputes the plaintiff's claim, the Court may order him to serve a defence within such time as it may direct.

It is significant to observe that O. 14 contains no provision as to the setting aside (or varying) of an order made under para. (3).

It is important to observe that, when the appellant/defendant filed the application before the magistrate to set aside the order of 23 April, he was not alleging any irregularity in the proceeding before the learned magistrate making the order. The application was solely on the merits: that the defendant was not negligent in not filing and serving the statement of defence; and that the defendant had a good defence against the plaintiff's claim. Had the application been based on irregularity then the learned magistrate would have had the power to hear the application by reason of O. 2 r. 2 of the SCR.

Retnam Pillai does not apply in the present case because the judgment in that case was based on the provisions of the former rules governing civil procedure in the subordinate courts namely the Subordinate Courts Rules 1950 (now repealed) where the provisions are different from the provisions in the SCR.

For the sake of completeness, I shall now deal with the arguments of the learned counsel for the appellant/defendant. Encik Sebastian's first argument is that the appellant/defendant could apply to set aside the order by reason of O. 1 r. 4 of the SCR. Rule 4 provides:

> **4. Where no procedure laid down.**
>
> (1) In any matter of procedure or practice not provided for in these rules, the procedure and practice for the time being in use or in force in the High Court shall, as near as may be, be followed and adopted.

The learned counsel argued that since there is no provision for setting aside in the SCR in respect of an order made under O. 14, therefore, r. 4 permits the adoption by the subordinate court of the procedure of the High Court in particular O. 19 rr. 2 and 9 of the Rules of the High Court 1980 ("the RHC"). Rule 2 provides:

> **2. Default of defence: Claim for liquidated demand.**
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> (1) Where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

And r. 9 states:

> **Setting aside judgment**
>
> 9. The Court may, on such terms as it think just, set aside or vary any judgment entered in pursuance of this Order.

The learned counsel submitted that the learned author of *Janab's Key to Civil Procedure in Malaysia and Singapore*, 1995, 2nd edn, fortified his contention. The relevant passage cited by learned counsel is found at p. 677 of the book and is as follows:

16.8 Setting Aside Judgment

There is no clear provision in the Subordinate Courts Rules 1980 for setting aside judgment in default of appearance or defence. However in the Rules of the High Court 1980 there are clear provisions to set aside judgment in default of appearance and in default of defence pursuant to Order 13 rule 8 and Order 19 rule 19 respectively. In practice the subordinate courts appear to follow the practice and procedure followed by the High Court pursuant to Order 1 rule 4(1) of the Subordinate Courts Rules 1980.

With respect, in my opinion, merely because the SCR does not contain any provision for the setting aside by the Magistrate's Court of its judgment given in default of defence, it cannot be said that there is a lacuna in the SCR. To my mind, it is axiomatic that the absence of a corresponding provision in the SCR *vis-a-vis* the provision in the RHC cannot be a sufficient basis for determining whether or not there is a lacuna in the SCR. As I see it, there is no lacuna at all in the SCR. For, in respect of a decision made under O. 14 r. 5(3) of the SCR, there is still avenue to have the decision set aside: the aggrieved party can appeal to the High Court. Order 49 r. 6 of the SCR provides:

6. Appeal to Judge in Chambers.

(1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.

The appeal must be considered an interlocutory appeal and must be made under r. 6 above because the decision to give the judgment in default of defence clearly was not a decision made after a trial. To my mind, the learned author in the above passage of *Janab's Key to Civil Procedure in Malaysia and Singapore,* 1995 2nd edn, is not prescribing any principle pertaining to setting aside of judgments or orders in default of defence by the subordinate courts but is merely stating his observation as to what "appears" to be the practice of the subordinate courts. With respect, I am not sure whether I can concur with the views of the learned author regarding the practice of the subordinate courts pertaining to setting asides and the application of O. 1 r. 4(1). However, assuming that such a practice indeed do exist and that it is based on O. 1 r. 4 of the SCR read with O. 19 r. 9 of the RHC then such a practice is based on a misconception of the law and must cease forthwith. If the practice is contrary to O. 29 r. 14 – and I hold that it is contrary to O. 29 r. 14 – then such a practice is wrong in law, no matter how widespread the practice is.

Second, learned counsel referred to s. 99A of the Subordinate Courts Act 1948 and s. 19 of the Third Schedule of the Act. Section 99A states:

99A. Further powers and jurisdiction of courts.

In amplification and not in derogation of the powers conferred by this Act or inherent in any court, and without prejudice to the generality of any such powers, every Sessions Court and Magistrate's Court shall have the further powers and jurisdiction set out in the Third Schedule.

Section 19 of the third schedule reads:

Discharge of orders.

19. Power to discharge, vary or suspend the operation of any of its judgments or orders to the extent and in the manner provided by rules of court.

Now, it is true that the above s. 19 of the third schedule gives the subordinate court the power to "discharge" any of its judgments or orders. And according to *Jowitt's Dictionary of English Law* (p. 620):

To discharge the order of a court or judge is to set it aside, on an application made for that purpose, either to the court in which the order was made, or to a court of appeal.

At the same time, however, it is significant to note that the power is restrictive in the sense that it may be exercised only "to the extent and in the manner provided by rules of court". The words "rules of court" in s. 19 mean any rules of court made under the Subordinate Courts Rules Act 1955. The SCR are such rules. As the SCR have prescribed the situations or circumstances in which the power to set aside may be exercised (eg, O. 2 r. 2, O. 24 r. 8, O. 25 r. 7, O. 28 r. 8, and O. 54 r. 10), and in the light of the implication of O. 29 r. 14, as I have explained, it follows that the power to set aside may only be exercised by the court in the situations or circumstances so specified, and not otherwise.

Third, it was argued by Encik Sebastian that the magistrate has the power to set aside the judgment in default of defence by virtue of the court's inherent power as so declared by O. 53 r. 11 of the SCR. This provision reads:

Inherent powers.

11. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or an abuse of the process of the Court.

While on the one hand, I concede that the court has wide inherent powers under this rule, including, in appropriate and deserving cases, the power to set aside its own judgments or orders, it is also my view that the court

must tread with caution in invoking the powers under this provision, otherwise this provision itself might be abused. Since there are already provisions elsewhere in the SCR for the setting aside of judgments or orders, it should only be in rare and exceptional cases that the court sets aside a judgment or order in the exercise of its inherent powers. Even then, under this provision it must appreciate that there is a limitation to the exercise of the inherent powers: the exercise of such powers is limited only to situations where it is "necessary to prevent injustice or to prevent an abuse of the process of the court". It is imperative for the court to bear in mind that the circumstances of the case must be such that it is clearly necessary for the court to exercise its inherent powers. The burden of satisfying the court on the necessity of exercising its inherent powers to prevent injustice or an abuse of the process of the court lies on the party seeking the court to invoke its powers. If we appreciate this limitation, then in the context of the present case, the irresistible conclusion is that O. 53 r. 11 is irrelevant. My reasons are these. First, before the learned magistrate the appellant/defendant was not alleging any abuse of the process of the court on the part of any party. Hence the question of abuse of process of court does not arise. Second, before the learned magistrate there was no question of preventing any injustice because the defendant/appellant had a right to appeal to the High Court against the previous decision of the magistrate.

Finally, in support of his arguments Encik Sebastian referred to the following cases:

(1) *Hamzah Atan v. Perbadanan Johor* [1995] 5 CLJ 183;

(2) *Tan Lee Siang & Ors. v. Kenneison Brothers Sdn. Bhd* [1999] 3 CLJ 422;

(3) *Kewangan Bersatu Bhd v. Yap Ah Yit & Ors.* [1999] 1 CLJ 429; and

(4) *Shaharuddin bin Abdul Rahman v. Satisah Ismail Sdn. Bhd* [1982] 2 MLJ 79.

With respect, I find none of the above cases cited relevant, for they can be distinguished from the present case. None of the above cases concern a judgment in default of defence made under O. 14 r. 5(3) of the SCR; and none of the cases discuss O. 29 r. 14 of the SCR.

In conclusion, I hold that by reason of O. 29 r. 14 of the SCR the learned magistrate was right in law in ruling that he did not have the power to set aside his own judgment given in default of defence under O. 14 r. 5(3) of the SCR, and that the appellant should have appealed to the High Court instead of applying to the magistrate to set aside his judgment.